

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILBERT JOSEPH MCKEEVER,

Defendant-Appellant.

UNPUBLISHED

September 16, 2014

No. 315771

Wayne Circuit Court

LC No. 12-007733-FH

Before: METER, P.J., and K. F. KELLY and M. J. KELLY, JJ.

PER CURIAM.

Defendant, Wilbert Joseph McKeever, appeals by right his jury convictions of unarmed robbery, MCL 750.530, and aggravated assault, MCL 750.81a. The trial court sentenced McKeever as a third habitual offender, MCL 769.11, to serve 85 to 30 years in prison for his armed robbery conviction and to time served for his aggravated assault conviction. Because we conclude there were no errors warranting relief, we affirm.

I. BASIC FACTS

In July 2012, Kenith Fawaz found Jennifer Craven in the hallway of his apartment complex. She appeared intoxicated. Fawaz, who had known Craven for approximately 13 years, assisted Craven into his apartment with help from his friend, Denise Scott. Craven used Fawaz's bathroom and then asked Fawaz for money. Fawaz refused to give her money. Craven then held Fawaz as McKeever, who was her boyfriend, approached from the hall. Fawaz escaped Craven's grasp and he and Scott ran downstairs. Scott left the building, but McKeever caught Fawaz and began to beat him.

Craven also came downstairs and, while McKeever was still beating Fawaz, she took Fawaz's wallet. According to Fawaz, Craven gave the wallet to McKeever and McKeever inspected it and removed its contents. A security camera's video showed Craven taking Fawaz's wallet and removing its contents. The video further shows McKeever taking the wallet and money from Craven and then discarding the wallet. The video finally showed McKeever leaving the building with Craven.

At trial, McKeever's lawyer conceded that McKeever attacked Fawaz, but maintained that he did so after an argument. He further contended that McKeever did not take Fawaz's money or help Craven do so—Craven simply took advantage of the altercation to rob Fawaz.

The jury rejected McKeever's lawyer's version of events and found McKeever guilty as described.

McKeever now appeals in this Court.

II. RIGHT TO COUNSEL

A. STANDARD OF REVIEW

McKeever first argues the trial court abused its discretion when it refused to consider his lawyer's potential motion to withdraw and violated his Sixth Amendment right to counsel by refusing to appoint substitute counsel. This Court reviews a trial court's decisions concerning a motion to withdraw and for the substitution of counsel for an abuse of discretion. *People v Echavarria*, 233 Mich App 356, 368; 592 NW2d 737 (1999); *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991). A trial court abuses its discretion when it selects a result that falls outside the range of principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

B. ANALYSIS

A criminal defendant has a constitutionally protected right to retain counsel of his or her choice. *United States v Gonzalez-Lopez*, 548 US 140, 144; 126 S Ct 2557; 165 L Ed 2d 409 (2006). However, this right is not absolute. *People v Akins*, 259 Mich App 545, 557; 675 NW2d 863 (2003). To determine if the defendant's right to counsel has been violated, the defendant's right to counsel of choice must be balanced against the public's interest in the prompt and efficient administration of justice. *Id.* Accordingly, when reviewing a trial court's decision concerning a motion to withdraw and substitute counsel, this Court will look to a variety of factors:

(1) whether the defendant is asserting a constitutional right, (2) whether the defendant has a legitimate reason for asserting the right, such as a *bona fide* dispute with his attorney, (3) whether the defendant was negligent in asserting his right, (4) whether the defendant is merely attempting to delay trial, and (5) whether the defendant demonstrated prejudice resulting from the trial court's decision. [*Echavarria*, 233 Mich App at 369.]

McKeever argues the trial court erred by refusing to hear his lawyer's "intended request to withdraw as counsel." However, it is not entirely clear that his lawyer intended to withdraw.

During a break in voir dire, McKeever's lawyer informed the court that McKeever had some complaints he wanted to put on record:

Defense Counsel: First of all,—not now. You don't have to deal with this now. At some point, would you please allow Mr. McKeever to know that the decision on whether Ms. Craven, who I have placed on the witness list, whether she can testify.

I don't know what this man's problem is. He seems to be upset with me for some reason, and I'm not going to tolerate it. At some point, explain to this man I don't have anything to do with Ms. Craven testifying. I couldn't explain it to him because he ain't trying to hear it.

Two, for some reason, I do not know why, he told me today that he wants his mother to testify. I don't know why.

And then he decided he ain't going to talk to me. So that's terrific. So we've got an attorney thing. So I asked—

The trial court apparently understood that McKeever's lawyer believed that McKeever was unhappy with his representation and wanted a new lawyer. But the trial court refused to hear anything further on their disagreement. Instead, it instructed McKeever's lawyer that he would be trying the case and that it was too late to change lawyers.

On this record, we cannot conclude that the trial court abused its discretion when it refused to either accept McKeever's lawyer's purported request to withdraw or to otherwise provide McKeever with a new lawyer. McKeever's trial was set for a single day and ultimately involved just two witnesses. The parties had prepared for months and McKeever had earlier stated on the record that he wanted to keep his lawyer despite a disagreement over strategy. Moreover, the parties had nearly completed voir dire and the witnesses had already been assembled and were ready for trial. Given the evidence and theories, a change in defense lawyer at this late stage would have unreasonably interfered with the public's interest in the prompt and efficient administration of justice, which outweighed McKeever's apparent desire for a different lawyer.

Further, McKeever was negligent in asserting this right only on the day of trial. Despite the fact that his lawyer stated that he did not intend to call any witnesses, McKeever remained silent, never questioning his lawyer's statement or seeking an adjournment. In addition, at the final conference in November 2012, the trial court specifically asked McKeever if he wanted to keep his lawyer and he stated that he did want to keep him. The conference was more than four months before trial, which would have given a substitute plenty of time to prepare. Moreover, it was evident that McKeever already disagreed with his lawyer over what witnesses would testify. Thus, McKeever was plainly aware that his lawyer's strategy concerning the witnesses differed from his own and yet he affirmatively agreed to proceed with that lawyer despite the differences. And his sudden change of heart at trial did not—by itself—warrant an adjournment and the substitution of counsel. See *Echavarria*, 233 Mich App at 369-370.

McKeever also failed to show prejudice from his lawyer's continued representation. He asserts that the trial court's decision deprived him of the right to assert a defense through the witnesses he wished to call. However, McKeever fails to explain what testimony these witnesses would have provided. Further, the evidence of McKeever's involvement in the assault and robbery was overwhelming. The jury heard Fawaz's testimony that McKeever directly participated in the robbery and saw a video showing McKeever handle what appears to be the proceeds of the robbery.

McKeever nevertheless argues that he was entitled to have substitute counsel appointed because he demonstrated good cause to do so. “Appointment of a substitute counsel is warranted only upon a showing of good cause and where substitution will not unreasonably disrupt the judicial process.” *Mack*, 190 Mich App at 14. But, as already noted, allowing substitute counsel at that point would have unreasonably disrupted the judicial process. See *People v Strickland*, 293 Mich App 393, 399; 810 NW2d 660 (2011). McKeever’s disagreement over whether to call a particular witness also does not demonstrate good cause for a substitution: “Counsel’s decisions about defense strategy, including what evidence to present and what arguments to make, are matters of trial strategy, and disagreements with regard to trial strategy or professional judgment do not warrant appointment of substitute counsel.” *Id.* at 398. He similarly argues that his relationship with his lawyer suffered a complete breakdown, as was seen by his refusal to communicate with his lawyer. He could not, however, refuse to cooperate with his lawyer in order to manufacture good cause for a substitution. *People v Traylor*, 245 Mich App 460, 462-463; 628 NW2d 120 (2001).

McKeever further maintains that the trial court had an obligation to inquire about his dissatisfaction, citing *People v Ceteways*, 156 Mich App 108, 119; 401 NW2d 327 (1986), and *People v Bass*, 88 Mich App 793, 802; 279 NW2d 551 (1979). However, if a defendant wishes for an inquiry into whether his counsel should be replaced, the defendant has the “responsibility to seek a hearing.” *Ceteways*, 156 Mich App at 118. McKeever did not seek such a hearing and the trial court did not err by failing to inquire whether McKeever’s relationship with his lawyer had broken down to the point where a different lawyer was required.

The trial court did not abuse its discretion when it refused to delay the trial in order to allow McKeever to obtain a new lawyer.

III. WITNESS TESTIMONY

A. STANDARD OF REVIEW

McKeever next argues that the trial court erred when it prohibited Craven from testifying. A party who proffers evidence that the trial court excludes must make an offer of proof to preserve the issue of admissibility of the evidence on appeal. MRE 103(a)(2); *People v Hampton*, 237 Mich App 143, 154; 603 NW2d 270 (1999). Additionally, a party must state specific purposes for the admission of the evidence; otherwise, the issues “are not properly preserved for our review.” *People v Hackett*, 421 Mich 338, 352; 365 NW2d 120 (1984). McKeever never made an offer of proof regarding the substance of Craven’s testimony, nor did he state any specific purposes for calling her. Thus, the issue is unpreserved. This Court reviews unpreserved claims for plain error. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

B. ANALYSIS

Although McKeever claims that the trial court determined that Craven could not be subpoenaed to testify at trial, the trial court did not make that determination. At the final conference in November 2012, McKeever’s lawyer indicated that he did not believe he could subpoena Craven “because she has an attorney.” The trial court stated that it knew of no reason

why he could not subpoena Craven. McKeever's lawyer stated that, if the prosecutor would provide Craven's address, he would subpoena her. The prosecutor did so, and McKeever's lawyer acknowledged that he had the information he needed. Both lawyers agree that she should be subpoenaed and the trial court thanked them for resolving the issue.

Despite that, McKeever contends that the record shows the trial court precluded Craven from testifying on two occasions. The first occurred during the exchange during voir dire where McKeever's lawyer explained that McKeever was angry:

Defense Counsel: First of all—not now. You don't have to deal with this now. At some point, would you please allow Mr. McKeever to know that the decision on whether Ms. Craven, who I have placed on the witness list, whether she can testify.

I don't know what this man's problem is. He seems to be upset with me for some reason, and I'm not going to tolerate it. At some point, explain to this man I don't have anything to do with Ms. Craven testifying. I couldn't explain it to him because he ain't trying to hear it.

Two, for some reason, I do not know why, he told me today that he wants his mother to testify. I don't know why.

This statement suggests that McKeever's lawyer could not call Craven for some reason out of his control. Nevertheless, the trial court never stated that she was precluded from testifying.

McKeever also claims that the trial court determined that Craven could not testify during his lawyer's closing statement after the prosecutor objected to the closing argument:

Defense Counsel: And Mr. Fawaz, last point number six, I'm going to have to choose my words carefully, too, because I'm trying to be nice today. Ms. Craven is—Mr. Fawaz is trying to protect Ms. Craven is what he's doing. He's trying to protect her.

The Prosecutor: Objection, your Honor.

The Court: She cannot testify. It's stricken. The jury is told to disregard it.

Defense Counsel: Mr. Fawaz's motivation is to protect Ms. Craven. He knows full well that Ms. Craven took his money. He knows full well that she took his wallet. He told the police what happened. That's how this officer knows. And now he comes in here today and he tries to save her.

The trial court made this statement during McKeever's closing argument and after the close of evidence. It could not, accordingly, constitute an evidentiary ruling. Because the trial court never precluded Craven from testifying, there was no plain error.

McKeever also mentions in passing that his inability to present “testimony in his defense” was caused by “counsel’s ineffective assistance” Yet he makes no further mention of a possible claim of ineffective assistance of counsel. Therefore, he has abandoned that claim of error. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

IV. FAWAZ’S STATEMENT TO POLICE

McKeever next argues the trial court erred when it refused to allow him to introduce Fawaz’s statement to an officer through the testimony by the officer-in-charge, Detective Marek Noworyta. Specifically, he contends that Fawaz’s statement was admissible under MRE 613. Because the issue is unpreserved, our review is for plain error affecting substantial rights. *Carines*, 460 Mich at 763.

MRE 613(a) allows the introduction of prior inconsistent statements “made by the witness” Further, under MRE 613(b), a prior inconsistent statement “is not admissible unless the witness is afforded an opportunity to explain or deny the same” As explained by our Supreme Court in *Barnett v Hidalgo*, 478 Mich 151, 165; 732 NW2d 472 (2007) (citations and quotation marks omitted):

Before attempting to impeach a witness by offering extrinsic evidence of a prior inconsistent statement, a litigant must lay a proper foundation in accordance with the court rule. To do so, the proponent of the evidence must elicit testimony inconsistent with the prior statement, ask the witness to admit or deny making the first statement, then ask the witness to admit or deny making the later, inconsistent statement, allow the witness to explain the inconsistency, and allow the opposite party to cross-examine the witness. However, extrinsic evidence may not be used to impeach a witness on a collateral matter . . . even if the extrinsic evidence constitutes a prior inconsistent statement of the witness, otherwise admissible under MRE 613(b).

Because McKeever’s lawyer did not lay a proper foundation for the admission of Fawaz’s statement under MRE 613, the trial court did not err when it precluded him from using the statement under that rule.

Even if McKeever’s argument could be understood as one arguing that Fawaz’s statement was admissible for impeachment purposes outside of MRE 613, it would still fail. In *People v Jenkins*, 450 Mich 249, 251-254; 537 NW2d 828 (1995), an officer was allowed to read the signed statement of a witness into evidence in order to impeach inconsistent testimony previously given by that witness. Our Supreme Court held that such practice was improper. *Id.* at 256-257:

Because a written memorandum of an oral statement is itself hearsay, allowing the impeaching witness to read from the written memorandum of the statement constitutes the admission of hearsay, unless a proper foundation is laid for admission as past recollection recorded. As stated in *People v Rodgers*, 388 Mich 513, 519; 201 NW2d 621 (1972), the impeaching witness is not relating what he heard, but offering “an extrajudicial statement . . . to prove the truth of

the thing said (that [the impeached witness] had spoken the words imputed to him).” [*Id.* at 256-257.]

Similarly, in this case, had Nowortya been permitted to read Fawaz’s statements, which McKeever asserts are contained within a written statement, the testimony would have been hearsay, “unless a proper foundation is laid for admission as past recollection recorded.” *Id.* at 256. One of the foundational elements of the past recollection recorded exception to the hearsay rule requires demonstrating that the witness “has insufficient recollection to enable the witness to testify fully and accurately” MRE 803(5). See also *People v Dinardo*, 290 Mich App 280, 293; 801 NW2d 73 (2010). No such showing was made. Consequently, the trial court did not err by refusing to allow Nowortya to read Fawaz’s statement from the police report.

V. SENTENCING ERRORS

Finally, McKeever argues that he was denied his right to due process at sentencing because the trial court relied on inaccurate and irrelevant information, and also failed to individualize his sentence. However, McKeever has not identified an error in scoring the sentencing guidelines and has not identified any inaccurate information used in calculating his prior record and offense variables. Instead, he challenges the trial court’s exercise of discretion in selecting the specific minimum sentence from within the properly calculated range. The Legislature, however, has foreclosed such challenges under MCL 769.34(10), which provides: “If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant’s sentence.” See also *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004).

There were no errors warranting relief.

Affirmed.

/s/ Patrick M. Meter
/s/ Kirsten Frank Kelly
/s/ Michael J. Kelly